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QUESTION PRESENTED

Whether the collateral estoppel doctrine, a component of the Double Jeopardy Clause, hitherto applied in criminal cases (as in civil cases) in retrials following a successful appeal as well as in successive trials, should now be limited in criminal cases only to successive trials?

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No. 91-1785

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHARLES PLUMMER, SHERIFF OF ALAMEDA COUNTY, Petitioner,

v.

JAMES PETTAWAY, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in Pettaway v. Plummer is reported at 943 F.2d 1041 (9th Cir. 1991) [Petitioner's Appendix A at 1-19, hereinafter App. A.]. The District Court's order denying respondent's petition for habeas corpus was unreported [App. B at 20-28]. The December 29, 1988, opinion of the

California Court of Appeal reversing the superior court's dismissal order is reported at 206 Cal.App.3d 1312, 254 Cal.Rptr. 436 (1988) [App. C at 29-94.] The May 16, 1985, opinion of the California Court of Appeal reversing respondent's conviction for violation of Penal Code section 187 [murder] was unreported [App. D at 95-106.]

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 23, 1991. Rehearing and rehearing en banc were denied on March 24, 1992 [App. E at 107]. The petition for certiorari was timely filed. 28 U.S.C. § 2101(c); Supreme Court Rules, 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1245.

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

A. The Offenses

For the purposes of this brief, respondent incorporates by reference the Circuit Court's rendition of the prosecution facts. See App. A. at 4. As that court did not recite the defense facts, respondent incorporates the rendition of those facts in the California Court of Appeal's 1985 opinion. See App. D at 98-99. To summarize: On May 1, 1981, Pettaway, his girlfriend Lowana Walker, and another man, Michael Seals, were at the home of Karen Taylor. At some point, Lowana handed Pettaway a gun and Pettaway shot Seals in the back of the neck. Seals fainted. When he regained consciousness, he

saw Pettaway and Lowana leave through the front door. Karen's dead body was later found in the bathroom. She had been shot twice.

Pettaway denied any involvement in either shooting. According to him, in addition to Walker, Seals, Taylor and himself, two other men were at Taylor's house. He heard a shot, saw Seals fall, and fled the scene. Later, he saw Lowana leave the house with the two men. After reentering the house with her and seeing Seals on the floor, bleeding, he and Lowana left.

B. The Trial

The prosecutor's principal theory of the case, and the one he argued to the jury, was that Pettaway had fired the fatal shots. The evidence and argument apparently did not persuade the jury to accept the prosecutor's theory of the case. The jury, which had not initially been instructed on aiding and abetting, made the following request during the third full day of deliberations. "Please explain the law concerning complicity, for example, in this case may the defendant be convicted of murder or attempted murder without having personally fired the bullets?"

At this point, the prosecutor changed gears. Apologizing for his earlier inadvertent failure to request aiding and abetting instructions, he urged the court to give them because "the jury could still convict the defendant of murder, if they believed Lawana Walker had in fact fired the fatal shots, because the only possible means of getting the gun would be from the defendant." App. C at 83-84. Over defense objection, the trial court instructed on aiding and abetting.

Shortly thereafter, the jury returned guilty verdicts on both counts. The jury also returned "not true" findings on the allegations that Pettaway had personally used a firearm and inflicted great bodily injury on Taylor in the commission of the murder. (Cal. Pen. Code §§ 12022.5, 12022.7.)[1] "True" findings were returned on those same allegations with respect to the attempted murder of Seals.

C. The First State Appeal

Pettaway appealed both convictions, arguing that the aiding and abetting instructions were prejudicially defective. Agreeing, the California Court of Appeal reversed Pettaway's murder conviction because "in making express findings that appellant did not personally use a firearm and did not inflict great bodily injury on Karen, the jury clearly convicted appellant of murder on an aiding and abetting theory. The aiding and abetting instructions given allowed the jury to find [Pettaway] guilty of first degree murder without considering the first degree murder instructions on intent. [fn omitted]. Consequently, the jury did not necessarily resolve the issue of appellant's intent under other, proper instructions." (emphasis in original). App. D. at 102-103.[2] The state appellate court affirmed Pettaway's attempted murder conviction, however, because the jury's affirmative findings on the enhancement allegations with respect to that count

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[1] Under California law, liability for firearm use and great bodily injury infliction requires personal culpability. In contrast, liability for murder can be based on either personal or derivative culpability.

[2] The State had argued that Pettaway's intent was established by the facts as a matter of law "because 'no other scenario except one involving appellant's intentional participation . . . is imaginable.'" The court specifically rejected that argument finding, to the contrary, that "it is entirely possible that [Pettaway] aided Lawana -- assuming she was the perpetrator -- by giving her the gun, knowing of her intent to kill Karen, without himself harboring the requisite intent." App. D. at 103, fn. 3 (emphasis in the original).

demonstrated that the attempted murder conviction was not premised on aiding and abetting.

D. The Hearing after Remand

On remand after reversal of the murder conviction, Pettaway successfully argued that double jeopardy and collateral estoppel limited the prosecution at the second trial to the aiding and abetting theory, based on the jury's unanimous findings that he did not personally use the firearm to kill Karen Taylor and did not personally inflict great bodily injury on her during the commission of the homicide. After the court's ruling, the prosecutor represented that he intended to "call the exact same witnesses and proceed in the exact same fashion" as at the first trial, except that he now intended to call Walker to testify against respondent.[3] The trial court indicated that all of the evidence admitted at the first trial would be admissible on retrial. Walker's testimony, however, would be irrelevant "because it is being offered to prove not that he aided and abetted her or anybody else but that he actually did the killing." The prosecutor was unwilling to try the

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[3]At the preliminary hearing held on October 9, 1981, the defense called Walker as a witness. She asserted her privilege against self-incrimination and refused to answer any questions, including the question whether she shot and killed Taylor. After the preliminary hearing she was also charged with murder and was held to answer to the same on December 8, 1981. At Pettaway's trial, which commenced on December 16, 1981, she was again subpoenaed by the defense and again asserted her privilege. The prosecutor chose not to give her immunity to testify.

At the time she asserted her privilege, Walker had given a statement to police in which she claimed that after Pettaway shot Seals he chased Taylor into a back room. She heard four shots, waited ten to fifteen minutes, and then went to investigate. She then saw Pettaway standing over Taylor's body with the gun. RT 14. At trial, however, Pettaway testified that Walker at one point confessed to him that she shot Taylor and then later recanted her confession.

In March 1983, Walker entered a plea of guilty to the reduced charge of accessory after the fact. Cal. Pen. Code § 31.

case with this limitation and announced himself unable to proceed. The court thereupon dismissed the case in the interests of justice under California Penal Code section 1385.

E. The Second State Appeal.

The State appealed, and on December 29, 1988 a divided panel of the California Court of Appeal reversed the dismissal in a published opinion. The majority held that double jeopardy was not implicated by negative jury findings on enhancement allegations and, in any event, the requirements of collateral estoppel were not met. Pettaway's petition for review in the California Supreme Court was denied on April 20, 1989.

F. The District Court Proceedings

Pettaway petitioned the District Court for the Northern District of California for a writ of habeas corpus. The petition was denied on January 2, 1990. The District Court held, in an unpublished opinion, that the jury's findings did not necessarily demonstrate that the jury had decided Pettaway was not the shooter.

G. The Appeal to the Ninth Circuit

Pettaway timely appealed to the Ninth Circuit Court of Appeals and, in a published opinion filed on August 23, 1991, that court reversed the district court's order and directed issuance of the writ. The Ninth Circuit found that Ashe v. Swenson, 397 U.S. 436 (1970), governed the case, and that Grady v. Corbin, 495 U.S. 508, (1990) provided an apt analogy. Concluding that all of the requirements of collateral estoppel were met, the Court found that the first jury's unanimous findings beyond a reasonable doubt established that Pettaway did not fire the fatal shots. Thus, double jeopardy principles would be offended if the State were permitted a second attempt to prove to a second

jury that Pettaway had fired the shots. The Court found that neither Double Jeopardy nor collateral estoppel, however, prevented Pettaway's reprosecution for murder on the theory that he was an aider and abettor. Nevertheless, since the prosecutor expressly eschewed any intention of prosecuting Pettaway on that theory, the Court was constrained to hold that the prosecution could not proceed at all." App. A. at 19.

REASONS FOR DENYING THE WRIT

There are at least three good reasons why this Court should deny the writ. First, petitioner has waived the question he seeks to present to this Court; second, petitioner has not demonstrated a split in the Circuits on the question presented because none exists; and finally, the Circuit Court correctly decided that principles of collateral estoppel and Double Jeopardy preclude the prosecution from retrying Pettaway as the direct perpetrator, but do not preclude them from retrying him as an aider an abettor.

I.

PETITIONER HAS WAIVED ANY CLAIM THAT ASHE V. SWENSON DOES NOT APPLY TO RETRIALS BY BELATEDLY RAISING IT FOR THE FIRST TIME IN HIS PETITION FOR REHEARING BEFORE THE CIRCUIT COURT WHEN THE APPLICATION OF ASHE HAS BEEN CENTRAL TO THIS LITIGATION SINCE ITS INCEPTION

As petitioner partially acknowledges in a footnote (See Petition, at 11, fn.2), until his petition for rehearing and rehearing en banc in the Circuit Court, he never argued that collateral estoppel principles do not apply on retrial of the same case. Up until that time, throughout both the state court and federal court proceedings, petitioner has implicitly accepted that Ashe v. Swenson, 397 U.S. 436 (1970) applies with as much force in the retrial of a single case as in the successive trial of a different case. Far from

disputing that proposition, petitioner has argued from that premise that collateral estoppel dignity should not be accorded the jury's special findings in this case for a variety of other, more case-specific reasons.

It is no excuse that petitioner did not think of this argument until the Circuit Court incorporated a discussion of Grady v. Corbin, 495 U.S. 508 (1990) in its opinion. Contrary to petitioner's suggestion, both sides had cited Grady in their briefs. More to the point, significant portions of Pettaway's opening brief and of petitioner's reply brief were devoted to arguments about why Ashe v. Swenson should or should not govern this case.

Under the Ninth Circuit's rules, arguments not timely presented are deemed waived, and this waiver doctrine applies to arguments raised for the first time in a petition for rehearing. United States v. Lewis, 798 F.2d 1250, 1250 (9th Cir. 1986) [order amending opn. and denying petn. for reh. & reh. en banc at 787 F.2d 1318 (9th Cir. 1986).] Since petitioner deprived the Circuit Court of any opportunity to address his contention in its opinion, and since not a single judge of the Circuit voted to rehear the case, this question has never been passed upon by the Circuit Court. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court. [citations omitted]. . . . 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.' [cit. omit.]." Youakim v. Miller 425 U.S. 231, 234 (1976). See also Berkemer v. McCarty, 468 U.S. 420, 443 (1984); Weinberger v. Rossi, 456 U.S. 25, 36, fn. 18 (1982); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397-398 (1971); Adickes v. Kress & Co., 398 U.S. 144, 147,

n.2 (1970); Lawn v. United States, 355 U.S. 339, 362-363, n.16 (1958). For the reasons set forth below, this is not the exceptional case for which this Court should abandon the general rule.

II.

NO CONFLICT BETWEEN FEDERAL CIRCUIT COURTS EXISTS ON THIS QUESTION ON THE QUESTION PRESENTED IN THE PETITION

Petitioner alleges that a conflict between the circuits exists on the question whether Ashe v. Swenson applies to retrials, but demonstrates no such conflict. In fact, he concedes that "numerous federal circuit courts" have applied the collateral estoppel doctrine of Ashe to retrials, and cites some of them: United States v. Dray, 901 F.2d 1132 (1st Cir. 1990), cert. denied, 111 S.Ct. 245 (1990); United States v. DeVincent, 632 F.2d 155, (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981); United States v. Citron, 853 F.2d 1055 (2nd Cir. 1988); United States v. Head, 697 F.2d 1200 (4th Cir. 1982), cert. denied, 462 U.S. 1132; United States v. Crooks, 804 F.2d 1441 (9th Cir. 1986); United States v. Powell, 632 F.2d 754 (9th Cir. 1980). Petitioner's list is, in fact, incomplete. See also United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979) modified 611 F.2d 585 (1980) cert. den. sub. nom Larkin v. United States, 446 U.S. 939 (1980); Rice v. Marshall, 816 F.2d 1126 (6th Cir. 1987); Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), cert. denied, 496 U.S. 929 (1990); United States v. Mespoulede, 597 F.2d 329 (2nd Cir. 1979) and Pugliese v. Perrin, 731 F.2d 85 (1st Cir. 1984).

As petitioner further concedes, except for a passing query in a footnote in United States v. Farmer, 923 F.2d 1557, 1563, fn. 12 (11th Cir. 1991) (which nonetheless

conducted a collateral estoppel analysis in the context of a retrial), none of the federal courts applying Ashe in any context have even suggested that the doctrine of collateral estoppel is limited to successive prosecutions.

There is a good reason for that. Ashe v. Swenson did not invent "collateral estoppel;" it explicitly borrowed the concept from civil litigation. Ashe, supra, 397 U.S. at 443. In the context of civil litigation it is well understood that "issue preclusion" (as the doctrines of direct and collateral estoppel have come to be known) applies in the retrial of the same case. "Issue preclusion may arise not only as between separate claims or causes of action but also within the confines of a single claim or cause of action. In the terminology that had become traditional by the advent of current efforts to refer to both types as issue preclusion, the first type is collateral estoppel and the second is direct estoppel. [fn. omit.] Direct estoppel questions ordinarily arise . . . [when] there is a decision that finally disposes of a part of a claim on the merits but does not preclude all further action on the remainder of the claim; issues common to both parts of the claim are precluded, even though new issues remain to be decided." [4] Examples abound of applications of the doctrine in retrials of the same civil case. See, for example, Zdanok v. Glidden Co., 327 F.2d 944, 955 (2nd Cir. 1964), cert. denied 397 U.S. 934 (1964); Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987); In re Falstaff Brewing Corporation AntiTrust Litigation, 441 F.Supp. 62, 66 (E.D. Mo. 1977) Span-Deck, Inc. v. Fabcon,Inc., 570 F.Supp. 81, 90 (D. Minn. 1983); Aiello v. City of Wilmington, 470 F.Supp. 414, 423 (D. Del. 1979), aff'd 623 F.2d 845 (3rd Cir. 1980).

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[4] Wright, Miller and Cooper, Federal Practice and Procedure, Vol. 18, § 4418, pp. 169-170.

Even United States v. Price, 750 F.2d 363 (5th Cir.), cert. denied 473 U.S. 904 (1985) does not provide the conflict in the circuits which petitioner alleges exists[5], since it is readily distinguishable from the Circuit's opinion below. In Price, supra, the Fifth Circuit found after reviewing the evidence and the split verdicts at the first trial of a multi-count trial that the acquittals on certain counts were simply inconsistent verdicts and therefore were not entitled to Double Jeopardy or collateral estoppel effect. Id., at 366. Here, by contrast, the Circuit Court explicitly found that this was not a case of inconsistent verdicts but rather one where "there is a rational explanation that takes into account the whole of the jury's verdict." App. A., at 13. Equally important, this is not a case where the federal court is alone in finding verdicts rational and consistent. The California Court of Appeal which reversed Pettaway's conviction in the first place did so because it found that the verdicts, as whole, demonstrated that "the jury clearly convicted [Pettaway] of murder on an aiding and abetting theory." App. D., at 102.[6]

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[5] Contrary to petitioner's assertion, Price did not establish a hard and fast rule that collateral estoppel principles never bar introduction of evidence on retrial. On the contrary, the Court preliminarily observed: "[e]ven though the doctrine affects the introduction of evidentiary facts necessarily determined in a prior lawsuit, United States v. De La Torre, 639 F.2d 245 (5th Cir. 1981), it does not prevent re-examination of an issue that is not necessarily determined in the former trial." Id., at 365. In De La Torre, supra and Larkin, supra, the Fifth Circuit had performed collateral estoppel analyses under the aegis of Ashe v. Swenson in retrials and had accepted as a matter of course that application of the doctrine in a particular case might limit pleading, evidence or argument. See De La Torre, supra, 639 F.2d at 248; Larkin, supra, 605 F.2d at 1371. Manifestly, there is no conflict between the Ninth and Fifth Circuits on the question whether Ashe v. Swenson can limit prosecution theories on retrial.

[6] It is true that the Circuit's opinion is at odds with the opinion of two justices of Division Two of the California Court of Appeal for the First Appellate District. See People v. Pettaway, supra [maj.opn.]. That opinion, in turn, refused to follow the earlier unanimous opinion of Division Five of the same court, on identical facts, in People v. White, 185 Cal.App.3d 822, 231 Cal.Rptr. 569 (1985). More importantly, the same "conflict" can be shown in every case where the federal court, on habeas corpus review, differs in outcome from the state court. Respondent submits that this Court's power to grant certiorari to settle important disputes between state and federal courts should not be engaged when even the state court has not

(continued...)

No conflict exists on the question presented between the Federal Courts or the State and Federal Courts. Certiorari should be denied for this reason alone.

III.

ON THE FACTS OF THIS CASE THE CIRCUIT COURT CORRECTLY DECIDED THAT THE JURY'S UNANIMOUS DECISION THAT PETTAWAY DID NOT PERSONALLY USE A FIREARM OR INFLICT GREAT BODILY INJURY ON TAYLOR CONSTITUTIONALLY ESTOPS THE PROSECTION FROM RETRYING PETTAWAY AS THE GUNMAN BUT NOT AS AN AIDER AND ABETTOR.

A. Petitioner has Misstated the Circuit Court's Holding.

Before turning to the merits, it is necessary to dispel certain inaccuracies in petitioner's characterizations of the Circuit's opinion. For example, petitioner asserts that the Circuit "has ordered a murder charge against respondent dismissed. . . ." (emphasis added) The Circuit has done no such thing. In fact, the Court's very narrowly drafted opinion makes it clear that if there is to be no retrial at all, that result is product of prosecutorial choice, not collateral estoppel principles. "[W]e hold only that it would violate double jeopardy principles if, on retrial of the second offense, the prosecution attempted to prove that Pettaway did personally use the gun. . . . Of course, the prosecution could still seek to prove Pettaway guilty of first degree murder under an aiding and abetting theory, but as we have pointed out, the prosecutor expressly eschews any intention to do so. Thus, because this prosecution must be based upon personal use

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[6](...continued)
settled its internecine differences. This seems especially true when none of the opinions involved turned on the question presented in this petition --whether Ashe v. Swenson applies only when distinct prosecutions are involved -- because petitioner never raised it.

of a firearm or nothing we are constrained to hold that it cannot proceed at all." App. A. at 19 (emphasis added).

The aiding and abetting theory which the prosecution professes to eschew is precisely the theory on which it won conviction at the first trial, albeit on defective jury instructions. Nothing in the Circuit's opinion prevents the prosecution even now from changing its mind, once this case is finally remanded to the trial court for further proceedings not inconsistent with the Circuit Court's opinion. In short, the opinion does not by any means bar retrial of respondent for Taylor's murder. It only precludes the state from retrying him on the personal gun use theory of which the jury acquitted him.

Petitioner also alleges that the Circuit has "created an exclusionary rule barring relevant evidence on retrial" (Pet. at 7, 9, 12) that will result in "evidence remaining [which] is insufficient to warrant conviction." Pet. at 14. Again, this is not true. The Circuit Court's opinion did not rule any evidence inadmissible. Indeed, it expressly declined to rule on the correctness of any evidentiary rulings. App. A. at 16, fn. 5. And, in fact, the state trial court's pretrial ruling did not exclude any evidence introduced by the prosecution at the first trial. The only evidence which the trial court provisionally barred was the testimony of Walker who, by prosecutorial choice, had not testified at the first trial. Whether the evidence which persuaded a first jury to convict under defective instructions will prove "insufficient to warrant conviction" under proper ones, remains to be seen.

B. The Circuit Court's Rationale Correctly Applies This Court's Precedents.

Petitioner argues that neither Double Jeopardy nor its incorporated doctrine of collateral estoppel protect a defendant from having to relitigate an ultimate fact found in his favor by a first jury if the prosecution seeks to reprove that fact to the new jury sworn to retry the defendant for the original offense. Such protection only applies where the prosecution seeks to try the defendant for a different offense. For this proposition petitioner cites the well-established rule that "the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to the conviction." Lockhart v. Nelson 488 U.S. 33, 38 (1988). See Pet. at 8-9. The rationale for that rule, of course, is that "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." North Carolina v. Pearce, 395 U.S. 711, 721 (1969). But as the Eleventh Circuit cogently observed in Delap.v Dugger, 890 F.2d 285, 312-313 (1989):

> Firmly established double jeopardy principles hold that a finding of insufficiency of the evidence renders the "clean slate" argument inapplicable. As the Court emphasized in Bullington v. Missouri, 451 U.S. 430 (1981)], "the 'clean slate' rationale recognized in Pearce is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case." 451 U.S. at 443 [parallel citation omit.].

Thus, it is clear that Double Jeopardy's bar against "successive prosecutions" has always applied to retrials of cases where the trier of fact or appellate court has determined that some critical evidence is insufficient.[7]

Petitioner acknowledges this point in a footnote, but asserts that "[n]either exception applies here." Pet. at 8, fn. 1. Despite his protestations, insufficiency of the evidence is exactly what is at issue in this case. The jury, by returning unanimous findings that the personal gun use and great bodily injury allegations vis a vis Karen Taylor were not true, unequivocally declared that the prosecution had not proved beyond a reasonable doubt that Pettaway had personally fired the fatal shots. These "separate verdicts" (Cal. Pen. Code, §1158a, subd.(b)) "actually represent[ed] a resolution, correct or not, of some of the factual elements of the offense charged." United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) quoted in Delap, supra, 890 F.2d at 312.

Petitioner is just as wrong in his assertion that collateral estoppel principles do no apply in retrials of the same case. As noted earlier, in Ashe this Court applied a concept it had borrowed from civil litigation. It would be nonsense to say that collateral estoppel principles do not apply in subsequent civil trials of the same case. "Issue preclusion, unlike bar, forecloses litigation only of those issues of fact or law that were actually litigated and necessarily decided by a valid and final judgement between the parties, whether on the same or a different claim." Segal v. American Telephone & Telegraph,

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[7] In Bullington v. Missouri, supra, for example, the state sought the death penalty anew after the trial court granted the defendant a retrial, even though the jury at the first trial had fixed the penalty at life imprisonment. Similarly, in Arizona v. Rumsey 467 U.S. 203 (1984), the state sought the death penalty after the state supreme court set aside the previously imposed life sentence and remanded the case for a new sentencing hearing. In both instances, double jeopardy principles were applied to retrials of the same case.

Co., Inc., 606 F.2d 842, 845 (9th Cir. 1979) (emphasis added.); see also cases ante. Nor has petitioner demonstrated any compelling reason for following a different rule in criminal cases.

Nothing in Ashe, supra or Ohio v. Johnson, 467 U.S. 493, 500, fn. 9 (1984) suggests that issue preclusion in the criminal law has a different meaning from issue preclusion in the civil law. In fact in Ashe, supra, the Court took great pains to show that applying the doctrine of collateral estoppel to a different second prosecution was analytically the same as applying it to the attempted retrial of the same case:

> After the first jury had acquitted the petitioner of robbing Knight, Missouri could certainly not have brought him to trial again upon that charge. Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that the petitioner was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery of Knight in the hope that a different jury might find that evidence more convincing. The situation is constitutionally no different here, even though the second trial related to another victim in the same robbery." (Id., at 446)

Indeed, as the foregoing analogy makes clear, the application of issue preclusion in this case not an "extension" of Ashe at all. It is, rather, a more conservative application of Double Jeopardy principles than Ashe itself. If application of Double Jeopardy in its purest form prevents a new prosecution of the same charge on which there has been a previous acquittal, then Ashe is at the opposite end of the spectrum, for it prevents a new prosecution of an entirely different charge, because of a previous acquittal on a related charge. This case presents only an intermediate step between "pure" Double Jeopardy and Ashe: here the previous acquittal by special verdict on a discrete factual element of a charge prevents relitigation of that fact in a renewed prosecution of the

same charge. This case does not take Double Jeopardy protection half as far as Ashe did.

The dictum in Ohio v. Johnson, supra on which petitioner relies (Pet. at 10) also does not support his claim that collateral estoppel is inapplicable on retrial after reversal on appeal. In Johnson, the defendant was charged in a single indictment with murder, involuntary manslaughter, aggravated robbery and grand theft. At his arraignment, over the State's objection, the trial court accepted his guilty pleas to involuntary manslaughter and grand theft, and then dismissed the murder and robbery charges on the ground that his prosecution for those counts would subject him to double jeopardy. It was in this factual context that the Supreme Court observed:

> [Defendant] also argues that prosecution on the remaining charges is barred by the principles of collateral estoppel enunciated by this Court in Ashe v. Swenson, 397 U.S. 436 [par. cit. omit.] (1970). . . . [T]he taking of a guilty plea is not the same as an adjudication on the merits after a full trial, such as took place in Ashe v. Swenson. Moreover, in a case such as this, where the State has made no effort to prosecute the charges seriatim, the considerations of a double jeopardy protection implicit in the application of collateral estoppel are inapplicable.
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> Ohio v. Johnson, supra 467 U.S. at 500, n. 9.

In speaking of seriatim prosecution in Johnson, supra, this Court was clearly differentiating the practice of filing successive indictments charging different offenses with the single indictment before the Court in Johnson. That factual distinction hardly supports the massive change in the doctrine of collateral estoppel that petitioner would have this Court adopt.

The Circuit's opinion properly placed primary reliance on this Court's opinion in Ashe which, since it factually involved successive prosecutions, did not discuss its

application in situations involving retrials. It also properly relied on this Court's opinion in Dowling v. United States, 493 U.S. 342 (1990), which explicated Ashe, for the proposition that the Double Jeopardy Clause will not tolerate reprosecution when, in order to convict, a second jury will have to reach a conclusion directly contrary to that of the first jury. The Circuit Court's opinion is a sound application of this Court's controlling precedents.

The Circuit's supplementary discussion of this Court's then most recent opinion on Double Jeopardy jurisprudence in Grady v. Corbin, supra, does not change that fact. The Circuit Court's observations about Grady were not only proper but hardly unique. As both the Ninth Circuit and the Eleventh Circuit in United States v. Farmer, supra have recognized, Grady does have some illustrative value for collateral estoppel cases. For as the Farmer Court observed, "the Grady rationale applies with equal force to the instant case because collateral estoppel, like the type of 'same offense' test outlined in Grady, focuses on the issues actually litigated." Farmer, supra, 923 F.2d at 1564, fn. 16.

As the Circuit Court opinion recognized, Grady is also relevant to collateral estoppel cases because it illustrates that the policies served by the Double Jeopardy Clause in general and the collateral estoppel doctrine in particular are much broader than petitioner admits in his petition at page 11. The evil of successive prosecutions, "whether following acquittals or convictions," is not only that they subject the defendant "to embarrassment, expense and ordeal and compel[] him to live in a continuous state of anxiety and insecurity." Grady, supra, 495 U.S. at 518. "Multiple prosecutions also give

the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more the offenses charged." Id., at 518.)

Grady also demonstrates that this latter concern is implicated even when the first is not, fully. Grady held that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, supra, 495 U.S. at 521. On the facts before it, that meant that the State could not seek to "prove the entirety of the conduct for which Corbin was convicted --driving while intoxicated and failing to keep right of the median -- to establish essential elements of the homicide and assault offenses." However, this Court frankly acknowledged that its holding did not bar prosecution for homicide and assault if the State could prove those charges without relying on the conduct to which Corbin had pleaded guilty, but instead relied on other conduct, such driving too fast for the weather conditions. Thus, even if the Double Jeopardy Clause did not completely protect Corbin from reprosecution, it still "prevent[ed] the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction." Tibbs v. Florida 457 U.S. 31, 41 (1982) quoted in Grady, supra, 495 U.S. at 518.

The Circuit Court correctly saw a parallel between this case and Grady. Grady reiterated that the Double Jeopardy Clause will not permit the prosecutor to "refine[] his presentation in light of the turn of events at the first trial." Grady, supra, 495 U.S. at 518 quoting Ashe v. Swenson, supra, 397 U.S. at 447. Thus, while Grady is not about

"collateral estoppel," it nevertheless provides a compelling analogue because it is animated by the same concerns, and much of the same analysis, as a collateral estoppel case. The Circuit Court's observations were not misplaced.

CONCLUSION

For the foregoing reasons, respondent Pettaway respectfully submits that the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit should be denied.

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Respectfully submitted,

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